

**Congress of the United States**  
**Washington, DC 20515**

February 12, 2016

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The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, DC 20554

Re: MB Docket No. 15-64

Dear Chairman Wheeler:

We write to ask that you fully consider the impact of your announced set top box proposal on the rights of creators involved in the production of television programming. As Members of the House Judiciary Committee, we have jurisdiction over the Copyright Act, which provides creators exclusive rights in their works and thus incentivizes creativity that benefits our society as a whole. As a result, it is our responsibility to ensure that no government action weakens these incentives or undermines the exclusive rights Congress has granted.

We understand it is not, nor should it be, in the jurisdiction of the Federal Communications Commission (FCC) to regulate either the exclusive rights of copyright owners or the licensing of these rights. However, there is no doubt that telecommunications and copyright law affect one another and even overlap.<sup>1</sup> Therefore, it is sometimes the case that FCC actions designed either to further or implement telecommunications policy affect the rights of copyright holders.

You have acknowledged that your set top box proposal has implications for copyright protection.<sup>2</sup> Even proponents, in referencing the copyright fair use defense, acknowledge that your proposal has copyright implications.<sup>3</sup> Others, including many in the creative community, have raised concerns that your proposal may impact the rights Congress has granted to them under the Copyright Act and that an apps-based approach would better protect the rights of copyright rightsholders. Therefore, we must take seriously the potential that this proceeding, depending on the path chosen, could upset the delicate system that underlies the creation, licensing, and distribution of copyrighted television programming and potentially jeopardize efforts to prevent copyright infringement.

Production of professional motion picture and television programming is a complex undertaking that requires creative contributions from hundreds, and sometimes thousands, of creative professionals. Due to the high costs and risks associated with these productions, and the number of different copyrighted works involved, a complex system has been developed that finances production, compensates the myriad creators, and licenses rights from many

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<sup>1</sup> Sections 111, 119, and 122 of the Copyright Act of 1976

<sup>2</sup> Tom Wheeler, "It's Time to Unlock the Set-Top Box Market," *<re/code>*, January 27, 2016, <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>

<sup>3</sup> Filing of Consumers Union, MB Docket No. 15-64 at 5 (Oct. 8, 2015) and Filing of Public Knowledge, MB Docket No. 15-64 at 15 (Oct. 7, 2015)

rightsholders. Creators often bargain to receive payments derived from the advertising revenue and subscriber fees collected by distributors of television programming. So, for example, each subsequent time a program airs on television: directors, actors, and writers may receive direct payments ("residuals" or "participations"); below-the-line film crews may receive contributions toward their pension and health care plans; and songwriters, composers, and music publishers receive performance royalties for the music synched with the television programming. Songwriters, music publishers, recording artists and record labels similarly receive performance royalties generated by cable music channels, which may also be impacted by your proposal. Producers of television programming finance production by bargaining for compensation from television distributors and often separately license rights by geography, format, and time.

Any regulatory action that threatens the revenue sources from which these myriad creators receive compensation could shift revenues to unlicensed sources or sources that pay less. This action could also facilitate copyright infringement, negatively affecting the entire creative ecosystem underpinning television programming. Enforcement of copyright law and protection of the rights granted to holders of copyrights are not subjects natural to the pursuits of the FCC. Accordingly, we urge you to ensure that your notice of proposed rulemaking (NPRM) is balanced, fully considers information related to both your announced set-top box proposal and other approaches such as an apps-based model, and gauges the impact of each on the creative community. Due to the complexity of these issues, we suggest you consult with agencies more familiar with rightsholder issues, like the USPTO and Copyright Office, both when crafting those aspects of the NPRM and as a resource for understanding the copyright issues raised during the rulemaking process.

Thank you for your careful consideration in this regard.

Sincerely,

  
Tom Marino  
Member of Congress

  
Ted Deutch  
Member of Congress

Cc: Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O'Reilly



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

April 11, 2016

The Honorable Ted Deutch  
U.S. House of Representatives  
2447 Rayburn House Office Building  
Washington, D.C. 20515

Dear Congressman Deutch :

Thank you for your letter regarding the recent Notice of Proposed Rule Making (NPRM) seeking comment on how to better foster competition in the set-top box marketplace and Section 629 of the Communications Act, specifically regarding the impact it may have on the myriad of creators involved in the production of television programming. Your views are very important and will be considered as part of the Commission's review.

Today, there is an abundance of rich content in the television landscape. New technology is paving the way for software and apps to help consumers enjoy this content. Consumers deserve a variety of choices to view the programming they want, when they want and on the device they want. More choices often drive down consumer costs and drive up innovation.

The issue before the Commission is how to satisfy Section 629 in a world of evolving technology. I agree with you that any rules we adopt must reflect marketplace realities and ensure copyright protections, and I assure you that is a paramount concern as we consider how to meet the statutory obligation.

At the February 18<sup>th</sup> Commission meeting, we adopted a NPRM to fulfill the statutory requirement of competitive choice for consumers. Like all NPRMs, this action opens a fact-finding dialog to build a record upon which to base any final decision.

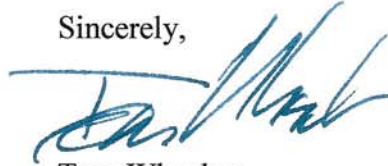
The new proposed rules would create a framework for providing device manufacturers, software developers and others the information they need to introduce innovative new technologies, while at the same time maintaining strong security, copyright and consumer protections. Nothing in this proposal changes a company's ability to package and price its programming to its subscribers, or requires consumers to purchase new boxes.

You express concerns that rules intended to achieve Section 629's mandate could diminish the viewing experience and the economic underpinnings that support investment in innovative content. The Commission's proposal preserves the same copyright protections that exist today and are honored by existing competitive navigation devices such as TiVo. In addition, the NPRM seeks comment on whether and how we should take further actions to address the concerns you raise. For instance, the item asks numerous questions about how to protect the rights and negotiated agreements of content owners. The item also specifically states

that “our regulations must ensure that Navigation Devices...cannot technically disrupt, impede or impair the delivery of services to an MVPD subscriber.” In this vein, the items asks a number of questions related to advertising and copyright concerns raised by content owners.

I believe the Commission’s proposal will lead to innovation that will implement the statutory mandate and improve consumer choice (including options for innovative content providers) while preserving copyright protections. It is important to emphasize that this NPRM is the stage in the process where we collect information. While we have put forth a proposal, we are seeking comment on it – including how to address any concerns it may generate. As we develop a record and explore fulfilling the statutory mandate, all entities are invited to comment on the proposal, including other Federal agencies, in order to create a balanced and well informed approach. I have asked staff to consult with the Copyright Office on the issues you note. I look forward to continuing to work with you on this important issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", with a horizontal line extending from the left side of the signature.

Tom Wheeler





FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

OFFICE OF  
THE CHAIRMAN

April 11, 2016

The Honorable Tom Marino  
U.S. House of Representatives  
410 Cannon House Office Building  
Washington, D.C. 20515

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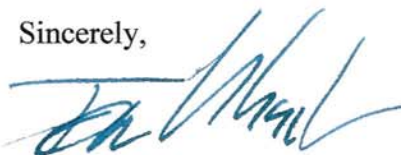
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Tom Wheeler